Date Mailed
November 16, 2001

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Complaint of AT&T Communications of Wisconsin, Inc., Concerning the Primary Interexchange Carrier Charge of Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin	6720-TI-156
Complaint of MCI Telecommunications Corporation Concerning the Primary Interexchange Carrier Charge of Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin	6720-TI-157

FINAL DECISION

This is the final decision in a Class 2 proceeding, as defined in Wis. Stat. § 227.01(3)(a)(1999-2000), conducted by the Commission on complaints filed by AT&T Communications of Wisconsin, Inc. ("AT&T"), Excel Telecommunications, Inc. ("Excel"), MCI Telecommunications Corporation ("MCI" or "MCI WorldCom"), and Sprint Communications Company, L.P. ("Sprint"), Complainants, against Ameritech Wisconsin ("Ameritech"), Respondent, to determine whether Ameritech established and is administering a Presubscribed Interexchange Carrier Charge ("PICC") in violation of one or more of Wis. Stat. §§ 196.196(2)(b), 196.219(2m), 196.22, 196.37, and 196.60. The Commission finds that Ameritech's intrastate PICC is a reinstatement of a carrier common line charge or a substitute carrier common line charge; that Ameritech is in violation of Wis. Stat. §§ 196.196(2)(b)3, 196.22, 196.37 and 196.60; and further orders refunds and other relief to Complainants.

Introduction

On July 5, 1994, the Wisconsin State Legislature enacted 1993 Wisconsin Act 496 which required in part that a price regulated "telecommunications utility shall eliminate 50 percent of

its intrastate carrier common line charge within one year after its election to become price regulated and shall eliminate the balance of its intrastate carrier common line charge within one year thereafter." Wis. Stat. § 196.196(2)(b)1(1999-2000). Ameritech elected to operate as a price regulated telecommunications utility as of September 1, 1994, pursuant to Wis. Stat. § 196.196.

In May of 1997, the Federal Communications Commission ("FCC") in Docket No. 96-262, revised the interstate access charge rate structure and created a switched access rate element, the Presubscribed Interexchange Carrier Charge ("PICC"). The PICC is "a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier" designed to capture "common line revenues . . . not recovered through SLCs" (Subscriber Line Charges). This is because the "$3.50 SLC ceiling for primary residential and single-line business customers prevents most incumbent price cap LECs from recovering, through end-user charges, all of the common line revenues permitted under our [the FCC's] price cap rules." *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, 12 F.C.C.R. 15982, 16019, CC Docket Nos. 96-262; 94-1; 91-213; 95-72, FCC- 97-158, 1997 FCC LEXIS 2591, ¶ 91 (May 16, 1997) (footnote reference omitted)(hereinafter *Access Charge Reform Order*). The Complainants argue that the PICC constitutes a carrier common line access charge or a substitute carrier common line access charge that is prohibited on an intrastate basis by the Wisconsin statutes.

By letter dated December 22, 1997, Ameritech filed for an exception tariff with the Public Service Commission of Wisconsin ("PSCW" or "staff") to implement an intrastate PICC of $0.16 per IntraLATA presubscribed line per month effective January 1, 1998. Ameritech represented that the PICC "does not in any manner constitute a substitute for a Carrier Common

Line Charge." (Exhibit 2 at 1, 2nd para., last sentence.) On December 30, 1997, AT&T requested that the Commission investigate Ameritech's PICC filing. (Exhibit 1, letter from Ms. Phyllis Dubé, Assistant Vice President, State Government Affairs, Wisconsin.) Staff responded with a letter dated May 1, 1998.

> "The staff requested supporting documentation from Ameritech, including data on how the intrastate PICC was calculated. That information was filed (under confidentiality procedures) and has been reviewed by staff. Ameritech has calculated the revenues lost through the mirrored changes to access rates, using intrastate demand. It has then divided that revenue amount by the number of access lines and applied the resulting charge based on intraLATA pre-subscription. Staff finds this to be a reasonable approach. Staff found no indication that Ameritech included any CCLC revenues in development of the intrastate PICC charge. Staff concludes, therefore, that Ameritech's PICC tariff does not need modification or withdrawal, and that this investigation can be closed.
>
> This is a staff determination. If any party wishes to appeal this staff determination to the Commission, it must notify the Commission of that fact within 20 days." (Exhibit 4 at 1-2.)

The staff determination was not appealed. On May 15, 1998, Ameritech amended their tariff to reflect that the PICC is based on intrastate instead of intraLATA pre-subscription, correcting, Ameritech said, a typographical error (Tr. at 21, 239). On July 2, 1998, Ameritech filed a tariff amendment increasing its intrastate PICC from $0.16 to $0.30 per line, per month, effective July 13, 1998. By letter dated November 5, 1998, AT&T informed Ameritech that AT&T's invoices appeared to show that Ameritech was "applying its intrastate PICC based upon interLATA pre-subscription." (Exhibit 3 at 1, 3rd par., 2nd sentence.)

On December 4, 1998, and December 16, 1998, respectively, MCI and AT&T filed complaints with the Commission challenging Ameritech' s PICC rate (which resulted in this case). On August 24, 1999, the Commission issued a notice of Proceeding, Prehearing

Conference, and Assessment of Costs. Excel Telecommunications Inc. ("Excel") and Sprint Communications Company L.P. ("Sprint ") were added as complainants at the September 17, 1999, prehearing conference. The parties at the prehearing also agreed to a statement of issues. The hearing was held on February 1, 2000. The four complainants and respondent participated. Complainants filed their Initial Briefs on March 24, 2000, Ameritech filed its Reply Brief on April 21, 2000, with complainants Rebuttal Briefs received on May 12, 2000. In addition, parties filed Proposed Orders on June 16, 2000.

Findings of Fact

1. Ameritech is a telecommunications utility as defined in Wis. Stat. § 196.01(10), with more than 150,000 access lines in use in this State.
2. On September 1, 1994, Ameritech elected to be regulated under Wis. Stat. § 196.196, ("Telecommunications Utility Price Regulation") as of September 1, 1994, the same date legislation allowing them to do so went into effect.
3. Ameritech eliminated its intrastate carrier common line charge on September 1, 1996, pursuant to Wis. Stat. § 196.196(2)(b)1,
4. On May 7, 1997, the Federal Communications Commission ("FCC") issued an order in Docket No. 96-262, revising the interstate access charge rate structure and creating a switched access rate element, the Pre-subscribed Interexchange Carrier Charge ("PICC"). The PICC is "a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier" designed to recover "common line revenues . . . not recovered through SLCs . . .." *Access Charge Reform Order*, *supra* at 2.

5. Effective January 1, 1998, Ameritech's exception tariff set forth a PICC rate of $0.16 per intraLATA pre-subscribed line per month.

6. On December 30, 1997, two days before the proposed effective date, AT&T filed a complaint objecting to Ameritech's tariff filing on December 22, 1997, which sought to establish the PICC charge.

7. On May 1, 1998, staff closed the investigation initiated by AT&T's complaint, finding Ameritech had used a "reasonable approach," that there was "no indication that Ameritech included any CCLC revenues in development of the intrastate PICC charge . . . (and) that Ameritech's PICC tariff does not need modification or withdrawal . . .. This is a staff determination." (Exhibit 4.)

8. Ameritech filed to correct its exception tariff on May 15, 1998, changing the language of its tariff to assess the PICC for intrastate rather than intraLATA usage.

9. Ameritech filed another amendment to its intrastate exception tariff on July 2, 1998, to be effective on July 13, 1998, that raised its PICC to $0.30.

10. As filed, from January 1, 1998, through the present time, Ameritech's intrastate PICC was, and continues to be, an intrastate carrier common line charge or a substitute charge.

11. AT&T, Excel, MCI WorldCom and Sprint were, and continue to be, access customers of Ameritech and were charged the intrastate PICC by Ameritech only for their interLATA pre-subscribed customers.

12. Ameritech assessed none of its intrastate PICC on intraLATA pre-subscribed carriers from January 1, 1998, through the present.

13. The result of assessing the PICC only upon interLATA carriers was to create two different levels of access charges for interLATA and intraLATA switched access service, with intraLATA switched access being charged at a lower rate than interLATA switched access.

14. InterLATA switched access service and intraLATA switched access service are identical contemporaneous services.

15. Ameritech is an intraLATA interexchange carrier, but is not, at this time, an interLATA interexchange carrier.

16. The Complainants in this case are both interLATA and intraLATA interexchange carriers. Complainants' end user customers utilize Ameritech common lines in the same manner, as do Ameritech's end user customers.

17. By assessing its intrastate PICC only upon the interLATA carriers, Ameritech provided itself a competitive advantage when viewed from the perspective of end use customers since it placed none of this cost on its customers' bills but forced the interLATA interexchange carriers to place this charge on their customers' bills. By creating more costs for its competitors and less for itself, Ameritech further disadvantaged the Complainants.

18. There is no evidence in the record to justify the preference that Ameritech accorded itself as an IntraLATA-only provider versus its competitors who provide both intra and interLATA service, or to justify its corresponding discrimination against interLATA carriers in assessing the PICC on interLATA carriers but not on intraLATA carriers.

Conclusions of Law

1. The Commission has jurisdiction under Wis. Stat. §§ 196.02, 196.03, 196.19, 196.196, 196.20, 196.219, 196.22, 196.24, 196.26, 196.28, 196.30, 196.37, 196.40, 196.44, 196.60, 196.604, 196.64, and 196.66 to issue the following Order.
2. As a price-regulated telecommunications utility that has already eliminated its carrier common line charge, Wis. Stat. § 196.196(2)(b)3 prohibits Ameritech from reinstating "an intrastate carrier common line charge or a substitute charge." (*Id*.)
3. Ameritech's intrastate PICC is a flat carrier common line charge or a substitute carrier common line charge.
4. Since Ameritech's intrastate PICC is a carrier common line charge or a substitute carrier common line charge, Ameritech is in violation of Wis. Stat. § 196.196(2)(b)3.
5. Neither the Commission nor its staff has the power to allow filed rates that violate Wisconsin statutes.
6. There is no rational cost justification for the disparate treatment of pre-subscribed interLATA and intraLATA customers in allocating PICC charges by Ameritech.
7. AT&T, Excel, MCI WorldCom, Sprint and other interLATA switched access customers are entitled to a refund of all amounts they have paid for the PICC since January 1, 1998, with interest computed in accordance with the method established in Wis. Admin. Code PSC § 165.051(5), taking into consideration the date of refund. The calculated interest rates for the year's 1998-2001 are 5.5, 4.5, 5.7 and 6.0 percent.

Opinion

ISSUE 1A: Under what legal authority in Wisconsin was Wisconsin Bell, Inc. doing business as Ameritech Wisconsin ("Respondents") intrastate Primary Interexchange Carrier Charge ("PICC") first established?

Ameritech Wisconsin ("Ameritech") mirrors, or incorporates by reference in Wisconsin, its interstate access service rate structure filed with Federal Communications Commission, unless an exception tariff is filed. Wisconsin statutes limit the Commission's role in price regulation of intrastate access services by price regulated telecommunications providers. Except for the prohibition against a price-regulated telecommunications utility with more than 150,000 access lines in use charging an intrastate carrier common line access charge or a substitute charge, the PSCW may not "review or set the rates for intrastate access services offered by price-regulated telecommunications utilities." Wis. Stat. § 196.196(2)(a).

In 1997, the Federal Communications Commission ("FCC") defined the PICC as "a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier" designed to capture "common line revenues . . . not recovered through SLCs [Subscriber Line Charges] . ..." *Access Charge Reform Order*, *supra* at 2. As a price-regulated telecommunications utility with more than 150,000 access lines in Wisconsin, Ameritech may not charge intrastate access rates that exceed their "interstate rates for similar access services." Wis. Stat. § 196.196(2)(b)1. The PICC is in dispute because Ameritech is also required to eliminate intrastate carrier common line charges and cannot "reinstate an intrastate carrier common line charge or a substitute charge." Wis. Stat. § 196.196(2)(b)3. The issue is whether the intrastate PICC is a carrier common line charge or a substitute charge. Since the Wisconsin statutory prohibition against a carrier common line charge took effect on September 1, 1994, about 3 years before the PICC was

established, a determination must be made in this case as to whether the PICC, and/or to what extent the PICC, is prohibited in Wisconsin.

Thus, the PICC is a federally created rate element that only falls within the Commission's jurisdiction if it is "an intrastate carrier common line charge or a substitute charge" and therefore prohibited by Wis. Stat. § 196.196(2)(b)3.

ISSUE 1B: Does the Commission have the jurisdiction to review the complaints brought by AT&T, MCI, Excel and Sprint?

The Commission has several areas of authority from which it can derive its jurisdiction in this case. First and foremost and as noted above, the Commission has not only the authority but the obligation to enforce Wis. Stat. § 196.196(2)(b)3. In a broader sense, the Commission also derives its jurisdiction from Wis. Stat. §§ 196.02 (Commission's powers), 196.219 (Protection of telecommunication consumers), 196.26 (Complaint by consumers; hearing; notice; order; costs), 196.28 (Summary investigations), and 196.37 (Lawful rates; reasonable service).

AT&T filed their initial complaint against Ameritech's $0.16 intrastate PICC on December 30, 1997. Staff made a preliminary determination in their May 1, 1998, letter that "based on intraLATA pre-subscription" there was "no indication that Ameritech included any CCLC revenues in development of the PICC charge . . .. This is a staff determination." (Exhibit 4.) Ameritech's supporting documentation had been filed with the Commission on a confidential basis and was therefore not available to AT&T. Staff's letter stated their decision could be appealed to the Commission. No appeals were filed. Ameritech raised their intrastate PICC to $0.30 on July 13, 1998. AT&T notified Ameritech by letter dated November 5, 1998, that they believed Ameritech was not charging their intrastate PICC consistent with staff's

May 1, 1998, findings. "Specifically, Ameritech Wisconsin's invoices to AT&T appear to show that Ameritech Wisconsin is calculating and applying its intrastate PICC based upon interLATA pre-subscription." (Exhibit 3.) MCI filed a complaint and request for hearing on December 4, 1998, arguing that Ameritech's $0.16 and $0.30 PICC filings were unlawful. AT&T filed its complaint on December 18, 1998, requesting, among other things, that a formal hearing be held and a finding be made stating Ameritech's PICC was unlawful from its inception.

Wis. Stat. § 196.219(4) also allows the Commission on its "own motion or upon complaint filed by the consumer . . . to take administrative action against telecommunications utilities or providers to enforce this section." "'Consumer' means any person, including a telecommunications provider, that uses the services, products or facilities provided by a telecommunications utility or the local exchange services offered by a telecommunications provider that is not a telecommunications utility." Wis. Stat. § 196.219(1)(a).

The statutes are clear. The Commission has the authority to act upon complaints filed against the Incumbent Local Exchange Carrier ("ILEC") or in this case, Ameritech Wisconsin and, if necessary, take administrative action against Ameritech Wisconsin.

ISSUES 2 and 3: Does Respondent's PICC violate Wis. Stat. § 196.196(2)(b)(1)[1]? Does Respondent's PICC recover Carrier Common Line Charge revenues in violation of Section 196.196(2)(b)(3) [2]?

Issues 2 and 3 in many ways go to the heart of the case.

The first sentence of Wis. Stat. § 196.196(2)(b)1 incorporates the concept of what is called "mirroring" which is the by-product of dual regulation between the Federal and state governments.

Mirroring for price regulated telecommunications utilities in Wisconsin means that state access charges are to be at or below Federal access charges. Wis. Stat. § 196.196(2)(b)1 requires the elimination of common carrier line charges. Ameritech cannot mirror an access carrier common line charge on the intrastate side in Wisconsin. If the PICC is a substitute carrier common line charge then the entire PICC must be removed from Ameritech's intrastate access rates.

Ameritech, however, attempts a partial approach arguing that a portion of the $0.53 interstate access rate is not a CCLC charge and is therefore subject to mirroring. Ameritech filed an exception tariff on December 22, 1997, for an intrastate PICC of $0.16 per line. (Exhibit 2.) "Ameritech Wisconsin files an intrastate exception tariff that specifies only those portions of the interstate tariff that will not be applied to intrastate access services." (Ameritech Reply Brief at 5; *See also* Tr. at 54 lines 24 through 55, line 15.)

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[1] (b) 1. Intrastate access service rates of a price-regulated telecommunications utility with more than 150,000 access lines in use in this state may not exceed the utility's interstate rates for similar access services. The telecommunications utility shall eliminate 50% of its intrastate carrier common line charge within one year after its election to become price regulated and shall eliminate the balance of its intrastate carrier common line charge within one year thereafter.

[2] (b) 3. After eliminating intrastate carrier common line charges, the telecommunications utility may not reinstate an intrastate carrier common line charge or a substitute charge.

The question of mirroring is intertwined with the ultimate question of whether any or all of the PICC is a carrier common line access charge or a substitute carrier common line access charge which is prohibited by Wis. Stat. § 196(2)(b)3. If the PICC contains carrier common line or substitute charges, then Ameritech is mirroring a prohibited element. If the PICC contains at least some elements that are not carrier common line charges, then, the Complainants say, Ameritech must be mirroring rate elements that are already at their cap.

Ameritech argues that it is mirroring by state law, on a revenue neutral basis, all provisions of its interstate access tariff other than the prohibited carrier common line charge elements and that automatic mirroring "ensures that rate levels are at or below the interstate rate level for similar services . . .." (Ameritech Reply Brief at 15.) Ameritech witness J. Thomas O'Brien maintained that the FCC's Access Reform order creating the PICC "was done in a revenue neutral manner so that the same amount of overall revenues that the IXCs (interexchange carriers) had paid out on a per-minute of use basis were instead paid through the flat rate charges . . . The changes were all shifts from one rate to either an existing or newly established rate. " (Tr. at 218 lines 19-20 and at 221 lines 6-7.)

Essential to Ameritech's position is identifying what they say are 12 switched-access elements "resulting from the implementation of the FCC's Access Reform Order" (identified in Exhibits 17 and 18) in the interstate PICC that they say can then be mirrored on the state side. (Tr. at 281.)

The question of how to allocate local telephone costs among users has been problematic over time. The separation between Federal and State jurisdiction can also be awkward.

> "For much of this century, most telephone subscribers obtained both local and long distance services from the same company, the pre-divestiture Bell System,

> owned and operated by AT&T. Its provision of local and intrastate long-distance services through its wholly-owned operating companies was regulated by state commissions. The [FCC] Commission regulated AT&T's provision of interstate long-distance service. Much of the telephone plant that is used to provide local telephone service (such as the local loop, the line that connects a subscriber' s telephone to the telephone company's switch) is also needed to originate and terminate interstate long-distance calls. Consequently, a portion of the costs of this common plant historically was assigned to the interstate jurisdiction and recovered through the rates that AT&T charged for interstate long-distance calls. The balance of the costs of the common plant was assigned to the intrastate jurisdiction and recovered through the charges administered by the state commissions for intrastate services. The system of allocating costs between interstate and intrastate jurisdictions is known as the separations process. . . . (The FCC summarized by noting) [t]he difficulties inherent in allocating the costs of facilities that are used for multiple services between the two jurisdictions . . .."

A*ccess Charge Reform Order; Supra* at 2, 12 F.C.C.R. 15982, 15990, 1997 LEXIS 2591, ¶ 17.

In *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 737 F.2d 1095 (1984), the court observed that "local charges do not recover the full costs of local telephone facilities" and "heavy long distance users, under the current usage-based charges, pay a percentage of the costs wholly out of proportion to the costs of supplying them with service." *Id*. at 1105. As alternatives to ordinary long distance service arose and with the advent of competition, the fair recovery of costs became an issue. The FCC however did not want to apply a strict allocation of charges to costs for fear that local rates would become too expensive to achieve universal service. Section 1 of the Communications Act requires the FCC to regulate " by wire and radio so as to make available, as far as possible, to all people of the United States . . . a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .." 47 U.S.C.S § 151 (Law. Co-op. 1995 & Supp. 2001).

With their decision in the Access Order Docket 78-72, released February 28, 1983, the FCC found the Universal Service requirement somewhat incompatible with its other objectives of fairness and efficiency, concluding that they "are to some extent conflicting and that there is no possibility of devising a 'perfect' plan that would fully and immediately effectuate all our goals. Rather, it has become clear that any acceptable plan must balance these goals in a satisfactory manner." *In the Matter of MTS and WATS Market structure*, (*Access Charge Order)*, 93 F.C.C. 2d 241, 278, 1983 FCC LEXIS 596, ¶ 122 (February 28, 1983). It was in this context that the Common Carrier Line Charge (CCLC) was devised. "We [the FCC] required that beginning in 1984, LECs levy a flat monthly 'subscriber line charge' (SLC), in combination with a charge based on usage, directly on end users." *In the Matter of Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules*, 60 Rad. Reg. 2d (P&F) 142, FCC 86-145, 1986 FCC LEXIS 3560, ¶ 3 (April 28, 1986) (Footnote reference omitted). The usage charge is the CCLC defined as "[a] charge that is expressed in dollars and cents per access minute of use . . . assessed upon all interexchange carriers that use local exchange common line facilities for the provision of interstate or foreign telecommunications services . . .. 47 C.F.R. § 69.105 (2000). Thus the CCLC is a variable minute-of-use (MOU) charge used to recover the fixed expense of the local loop.

In general there are two types of costs — traffic sensitive and nontraffic sensitive. The "loop" is the line between the subscriber's network interface device (NID) and the local telephone company central office. Switching equipment at the local office then routes the call to either another local loop or to another central office where the call may be switched to a long distance carrier. A large part of the local plant is non-traffic sensitive, meaning the costs of installing the local loop are the same regardless of the number or type of calls the subscriber

places. Switching costs, on the other hand, may vary with usage. The CCLC, a MOU charge, along with the SLC, a fixed charge, are used to recover the fixed local loop cost.

This somewhat contradictory and unsatisfactory carrier common line cost recovery method continued to evolve on both the Federal and State levels. On September 1, 1994, as the result of a new law passed in Wisconsin, Ameritech opted for price regulation that mandated the elimination of their intrastate carrier common line charges by September 1, 1996. The FCC created the PICC in May of 1997 because the "$3.50 SLC ceiling for primary residential and single line business customers prevents most incumbent price cap LECs from recovering, through end-user charges, all of the common line revenues permitted under our price cap rules. To the extent that common line revenues are not recovered through SLCs, incumbent LECs will be allowed to recover these revenues through a PICC, a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier." *Access Charge Reform Order*, *supra* at 2. The CCLC remains in the federal code but only for non-price cap incumbent local exchange carriers. 47 C.F.R. § 69.105 (2000). The PICC, by contrast, is listed in "Subpart C – Computation of Charges for Price Cap Local Exchange Carriers." 47 C.F.R. § 69.153 (2000). Therefore, at the Federal Level, the CCLC and PICC are substitutes for one another depending on the method of regulation.

Ameritech-Wisconsin, price-cap regulated, is prohibited in Wisconsin from implementing a carrier common line charge or a substitute charge by Wis. Stat. § 196(2)(b)3. There are two possible interpretations being offered. Ameritech argues that it is the CCLC that the statutes prohibit while the Complainants maintain that the law does not allow Ameritech to charge any intrastate carrier common line access charges in Wisconsin. This is an essential determination because, if the Complainants interpretation is applied; the intrastate PICC is prohibited by

definition. (As has been stated, The PICC is designed to recover "common line revenues . . . ." (*Access Charge Reform Order, supra* at 2.) The assumption is that common line access charges are intended to recover common line access revenues.) If Ameritech's characterization is accepted, then the question of whether the PICC is a substitute CCLC must be addressed.

Both the CCLC and PICC are designed to recover common line costs except that the CCLC is based on MOU (variable cost) while the PICC utilizes a per-line flat charge (fixed cost) reflecting the true nature of the expense. At least in a broad sense, the PICC is designed to be a substitute access cost recovery method for the CCLC. Ameritech wants to keep the focus more narrow acknowledging that the "intrastate CCLC was a per minute-of-use-charge that applied to all intrastate switched access minutes of use" and arguing that Exhibits 17 and 18 demonstrate "none of the revenues recovered from the intrastate PICC were previously recovered from an intrastate CCLC." (Ameritech Reply Brief at 23.)

The essence of the distinction between the CCLC and the PICC, if any, needs to be examined. That the method of cost recovery is different, variable for the CCLC while fixed for the PICC, is obvious. If this is the only meaningful distinction then it is apparent that the PICC is a substitute for the CCLC. Ameritech does not believe the analysis should stop there and says that it is the composition of the PICC that should be considered. Exhibits 17 and 18 illustrate Ameritech's composition of their intrastate PICC as of January 1, 1998 ($0.16) and after the Federal Access Reform Rates went into effect ($0.30) (implemented by Ameritech on July 13, 1998). The elements include the Original and Terminating Residual Interconnection Charge ("RIC"), Local Switching, Information Surcharge, Tandem Switching, Tandem Termination, Tandem Facility, Host Remote Termination, Common Trunk Port, Dedicated End Office Trunk Port, Common Tandem MUX, and Dedicated Tandem Trunk Port, the last four elements created

by the FCC's Access Reform Order (Ameritech witness Michael D. Silver, Tr. at 282). In distinguishing these elements, Ameritech argues that they are not precluded from recovering common line costs, only the reinstatement of the CCLC. "It is undisputed that no intrastate revenues previously recovered from the now-eliminated CCLC are being recovered by the PICC or any other rate element." (Ameritech Reply Brief at 24.)

Complainants do not accept Ameritech's distinction and argue instead that the PICC is just the sort of intrastate carrier common line charge *or its substitute* that Wis. Stat. § 196.196(2)(b)3 prevents a price regulated telecommunications utility from collecting. "Otherwise, the plain language and intent of the statute would be rendered meaningless." (AT&T Reply Brief at 10.) In fact, complainants note that when Ameritech first submitted their PICC filing to the PSCW on December 22, 1997, they listed the PICC under "Carrier Common Line Charges." (Exhibit 2 at 2 and 4.) In so doing, Ameritech blurred the very distinction they attempt to create.

Ameritech's strict interpretation of a carrier common line charge trivializes Wis. Stat. § 196.196(2)(b)3. Illustrative is the manner in which the Code of Federal Regulations is organized for Telecommunication Access charges. Part 69 – Access Charges, is divided into 8 subparts including Subpart B, Computation of Charges, and Subpart C, Computation of Charges for Price Cap Local Exchange Carriers. The CCLC is defined as a "charge that is expressed in dollars and cents per line per access minute of use . . ." while the PICC is a "charge expressed in dollars and cents per line . . .." 47 C.F.R. § 69.105 and § 69.153 (2000). Before the PICC was established there was not a separate section for the computation of charges for price cap local exchange carriers. (*See* 47 C.F.R. § 69 (1996)) The PICC replaced the CCLC as a cost recovery method for price cap local exchange carriers.

> The significance of price cap regulation is explained in FCC' access order. "Price cap regulation fundamentally alters the process by which incumbent LECs determine the revenues they are permitted to obtain from interstate access charges for access services. Briefly stated, cost of service regulation is designed to limit the profits an incumbent LEC may earn from interstate access service, whereas price cap regulation focuses primarily on the prices that an incumbent LEC may charge and the revenues it may generate from interstate access services . . . Price cap regulation encourages incumbent LECs to improve their efficiency by harnessing profit-making incentives to reduce costs, invest efficiently in new plant and facilities, and develop and employ innovative service offerings, while setting price schemes at reasonable levels. In this way, price caps act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary."

Access Charge Reform Order, Supra at 2, 12 F.C.C.R. 15982, 15993-15994, FCC 97-158, 1997 FCC LEXIS 2591, ¶ 26 (May 16, 1997) (emphasis added).

Legislative intent presumes an "an interpretation that advances the purposes of the statute." *GTE North Inc. v. PSC* (176 Wis. 2d 559, 566, 500 N.W. 2d 284, 287, 1993) (citing *State v. Zielke,* 137 Wis. 2d 39, 46, 403 N.W.2d 427 (1987)). If, as at the Federal level, the general goal of Wis. Stat. § 196.196(2)(b)3 is to promote competition, then the IXCs and CLECs should be able to access Ameritech's embedded plant at reasonable cost so as to encourage competitive entry. To allow Ameritech to collect an intrastate PICC inconsistent with the legislature's intention may inhibit and even undermine the hoped for competition that price cap legislation helps promote.

As mentioned, the FCC created the PICC to recover "common line revenues . . . " (*Access Reform Order, supra* at 2.) Ameritech witness Michael D. Silver explained that the $0.16 did not include any effect of federal access reform on the Carrier Common Line (CCL) and "is no way a restatement of the CCL." (Tr. at 282, Q8&A.) Ameritech, however, does not dispute that 100% of their PICC interstate charge is comprised of Carrier Common Line *revenue*

requirements (Exhibit 9, pps. 74-77) maintaining that the *revenue components* (Exhibits 17 and 18) are distinguishable from the CCLC.

Ameritech's argument followed to its logical conclusion is self-defeating or at least incomplete. If there are identifiable PICC revenue components that are not common carrier line charges, then the $0.37 *difference* between the initial $0.16 Wisconsin PICC that Ameritech calculated and the $0.53 Federal PICC should be of some significance. If, as Ameritech claims, they are not reinstating the carrier common line charge, then the $0.37 difference would seem to be the prohibited intrastate carrier common line charge. This also appears to be staff's interpretation on May 1, 1998. "For intrastate purposes, Ameritech mirrors its federal access charges, except for the CCLC charge . . .." (Exhibit 4.) The difference that was not mirrored is $0.37.

Ignoring any potential significance of the $0.37, Ameritech raised their intrastate PICC to $0.30, an increase of 87.5%, effective July 13, 1998, in an attempt to recapture what Ameritech said was lost revenue as the result of the June 1, 1998, FCC Access Charge Compliance Order. Ameritech's attempt to blur the distinction between the PICC and the CCLC in both theory and value diminishes by the same degree the significance of Wis. Stat. § 196.196(2)(b)3.

Ameritech collects additional access revenue through what was meant to be non-recoverable common carrier line charges in Wisconsin. Ameritech attempts to circumvent the prohibition in Wisconsin against carrier common line charges by a price-regulated telecommunications utility by constructing distinctions that belie the purpose of Wis. Stat. § 196.196(2)(b)3.

This calls into question not only the $0.30 charge but the validity of the original $0.16 calculation as well. Ameritech's claim that identification of carrier common line revenue

components allows them the authority to collect carrier common line charges in Wisconsin, as long as those charges are not the CCLC they stopped charging after becoming price-regulated, is rendered self-serving and hollow by Ameritech's own actions. To say that the PICC is allowable because it is not the CCLC is to render the clear legislative intent of Wis. Stat.§ 196.196(2)(b)3, and its prohibition against substitute carrier common line charge, meaningless. Neither the $0.30 nor the $0.16 PICC can be permitted. The PICC, by definition and application, is a rational cost-based substitute CCLC for price cap LECs, designed to facilitate innovation and competition, and therefore cannot be charged by Ameritech in Wisconsin on an intrastate basis.

Legislative intent should not become lost in accounting semantics. In effect, Ameritech relies on arguments that conflict with the reality of the industry. A carrier common line charge is not a physical entity but an accounting element created in attempt to create fairness in the competitive process. Ameritech must have understood the intrastate carrier common line restriction when it adopted price regulation. Although calculated in a different manner than the CCLC, the PICC is still a carrier common line access charge and thus Ameritech is prohibited from passing those costs along to the Complainants.

Ameritech's attempt to circumvent the issue by arguing mirroring and revenue neutrality does not hold up. The claim by Ameritech witness J. Thomas O'Brien "that the concept of revenue neutrality for the purpose of rate restructuring is *implicit* in the FCC's May 1997 Access Reform Order" (Tr. at 229, emphasis added) demonstrates the weakness of Ameritech's claim because of their inability to find any specific authority for their argument. One wonders why the FCC's intent would have to be inferred from a 440-paragraph decision or any other related FCC order. The Public Service Commission of Wisconsin need not assume or infer absent plain language. This matter need not be clouded by implications but rather clarified by clear meaning.

The Wisconsin legislature has done that. Neither the CCLC nor the PICC are acceptable intrastate access charges for price cap telecommunication utilities in Wisconsin.

Ameritech witness O'Brien testified "there is no evidence that either Congress or the FCC intended for LECs to forego revenues as a result of the implementation of a more rational access rate design . . . (and) the Wisconsin PSC should not alter either the PICC rates or the access rate structure (including PICC) in a manner which would reduce Ameritech Wisconsin's revenues, as it would be inconsistent with federal access reform." (Tr. at 230, lines 3-5 and 12-15.) However, even if what Mr. O'Brien says about Congress or the FCC is correct, his argument is not relevant to Wisconsin. Wis. Stat. § 196.196(2)(b)3 has altered intrastate access rates by prohibiting an intrastate carrier common line charge or a substitute charge. The Commission is bound to follow the law as it exists.

The Complainants argue that if Ameritech chose to be price regulated today, Ameritech would have to eliminate all PICC charges. "Indeed, if Ameritech Wisconsin were to attempt to answer this question in any other way, we would have to assume that Ameritech believes the legislature meant to give a financial advantage to a company that elected price regulation prior to 1998, relative to a company that might elect price regulation today." (Tr. at 33, lines 2-6, AT&T witness Cathleen M. Conway, rebuttal.) Ms. Conway has a point. In particular, the language "or a substitute charge" in Wis. Stat. § 196.196(2)(b)3 is an ongoing prohibition against the charging of intrastate access rates designed to recover common line costs by price-regulated telecommunications utilities.

Even the validity of Exhibits 17 and 18 are undermined when it is realized that a significant portion of the underlying calculations contain what are, without question, carrier

common line charges. In the *Access Charge Reform Order*, the FCC observed that the record before it indicated —

> "that the costs of the line side port (including the line card, protector, and main distribution frame) are NTS [Non Traffic Sensitive] . . . . Accordingly, for price-cap LECs, we reassign all line side port costs from the Local Switching rate element to the Common Line rate elements. For price cap companies, these costs will be recovered through the common line rate elements, including the SLC and flat-rated PICC . . .."

Access Charge Reform Order, *Supra* at 2, 12 F.C.C.R. 15982, 16035, 1997 FCC LEXIS 2591, ¶ 125 (footnote references omitted).

On cross examination, Ameritech witness Michael D. Silver stated "[t]he line port is - - the primary reason for the change is (sic) in the local switching rate. " Mr. Silver explained that as a result of the *Access Charge Reform Order*, the line port was removed from local switching and moved into the calculation of the PICC on the interstate side. He then concluded – "The fact that our local switching rate was reduced means that it's part of the intrastate PIC-C (sic) as well." (Silver cross, Tr. at 289, lines 5-20.)

Exhibits 17 and 18 reveal the single most significant revenue difference resulting from the FCC's Access Reform Order and the FCC's Access Compliance Order (as calculated by Ameritech) is that for Local Switching. In fact, in both exhibits 17 and 18 the Local Switching shortfall exceeds the net total revenue shortfall. The degree to which the line port charge makes up the local switching charge is not calculated. However, relying on Mr. Silver's testimony that the line port is the primary reason for the change in the local switching rate, if the line port is a prohibited intrastate access carrier common line charge, then eliminating or reducing the Local Switching rate (by eliminating the effect of the line port charge) in Ameritech's calculations reduces the intrastate PICC to zero or a much smaller amount again depending on the percentage of the local switching charge reduction that is caused by the line port charge.

Ameritech witness J. Thomas O'Brien justified Ameritech's position by arguing that those same line port costs had been —

> " . . . included in the intrastate local switching charges in Wisconsin via mirroring. At the time that intrastate CCL was eliminated in Wisconsin, the Commission did not order that the line port portion of the intrastate local switching charge be removed. Therefore, the fact that the FCC created a "new" CCL does not make the continued recovery of these intrastate costs through the PICC wrong, not (sic) does it create a "new" intrastate CCL or the re-establishment of an intrastate CCL. Furthermore, just because these line ports are associated with a local loop does not also mean that they are common line costs.
>
> (O'Brien direct, Tr. at 228, lines 11-20.)

Ameritech offers conclusions without valid reasons. Their argument relies on past practice based on faulty economic principles. The rationale for the FCC's conversion of line-port cost from a local switching rate element to a common line rate element is "consistent with principles of cost-causation and economic efficiency . . .." (*Access Charge Reform Order*, *Supra* at 2, 12 F.C.C.R. 15982, 16035, FCC 97-158, 1997 FCC LEXIS 2591, ¶ 125.) Economic efficiency and rational cost-based allocation are essential cornerstones of meaningful competition. If Ameritech is allowed to include non-traffic sensitive common line rate elements in their intrastate PICC, they are in violation of both the specific mandate of Wis. Stat. § 196.196(2)(b)3 and the pro-competitive nature of modern day telecommunication regulation.

Line port charges are a carrier common line charge. Wis. Stat. § 196.196(2)(b)3 makes no distinction between common line charges and the CCLC. Ameritech must eliminate all carrier common line charges.

Therefore, the prohibition against intrastate carrier common line access charges by price-regulated telecommunications utilities with more than 150,000 access lines in Wisconsin

should not be obfuscated. By this decision the Gordian knot that Ameritech attempts to create is sliced and competition enhanced. If the PICC collects common line revenue then it is a common line charge or at least a substitute for one and therefore cannot be charged by Ameritech per Wis. Stat. § 196.196(2)(b)3.

ISSUE 4: Does Respondent's assessment of the PICC to only interLATA presubscribed carriers violate section 196.219(2m) [3] and/or section 196.60 [4] (of the Wisconsin Statutes)?

Ameritech does not dispute that interLATA and intraLATA interexchange customers are not treated the same. IntraLATA carriers are not charged anything while the entire intrastate PICC is based on interLATA pre-subscription. Since Ameritech does not provide interLATA services, their customers would not pay a PICC thus giving Ameritech a price competitive advantage in the intraLATA toll market.

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[3](2m) ACCESS SERVICES. A telecommunications utility shall provide access services under tariff under the same rates, terms and conditions to all telecommunications providers.

[4] 196.60 **Discrimination prohibited; penalty. (1)** (a) Except as provided under sub. (2), no public utility and no agent, as defined in s. 196.66 (3)(a), or officer of a public utility, directly or indirectly, may charge, demand, collect or receive from any person more or less compensation for any service rendered or to be rendered by it or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water, telecommunications service or power for any service in connection therewith, than that prescribed in the published schedules or tariffs then in force, or established under this chapter, or than it charges, demands, collects or receives from any other person for a like contemporaneous service.

(b) A public utility or an agent that violates par. (a) shall be deemed of unjust discrimination and shall forfeit not less than $100 nor more than $5,000 for each offense. An officer who violates par. (a) shall be fined not less than $50 nor more than $2,500 for each offense.

(2) Nothing in this section and s. 196.604 or any other provision of law may be construed to prohibit a telecommunications utility from furnishing service to its employes, pensioners and officers, and its employes, pensioners and officers may receive such service, at no charge or at charges less than those prescribed in its published schedules or tariffs. The commission may prescribe rules under this subsection. The rules may not prohibit or restrict the furnishing of service to employes, pensioners and officers or the receiving of service by employes, pensioners and officers at no charge or charges less than those prescribed in the telecommunications utility's published schedules or tariffs. No revenue may accrue or be credited in the accounts of the telecommunications utility for service furnished and not charged under this subsection.

(3) If a public utility gives an unreasonable preference or advantage to any person or subjects any person to any unreasonable prejudice or disadvantage the public utility shall be deemed guilty of unjust discrimination. A public utility violating this subsection shall forfeit not less than $50 nor more than $5000 for each offense.

On this issue, Ameritech is defiant - "True, (Ameritech admits to the disparate treatment) but so what. It is not unlawful discrimination to treat different classes of customers differently." (Ameritech Reply Brief at 28.) Ameritech's argument ignores the very goal of the PICC, i.e. rational *and* fair cost allocation.

Because there are PICC costs for both InterLATA and IntraLATA carriers, there is no cost justification to charge one group and not the other. The only reasonable interpretation of the fact that intraLATA carriers are not charged and that Ameritech is an intraLATA carrier is that Ameritech takes advantage of its position as the incumbent telecommunications provider. Thus, if Ameritech is allowed to engage in the disparate treatment, the PICC would not be a rational way to allocate cost but a vehicle for Ameritech to capture additional revenue to the detriment of potential competition.

Ameritech uses the PICC to their advantage and is unapologetic in so doing. They maintain that while the complainants may "wish to pay less, which does not make the calculation unlawful." (Ameritech Reply Brief at 28.) But when Ameritech cannot cost-justify treating InterLATA and intraLATA interexchange carriers differently, Ameritech's distinction becomes arbitrary. When that arbitrary distinction benefits Ameritech's bottom line at the direct expense of other telecommunication utilities, it becomes discrimination in violation Wis. Stat. §§ 196.219(2m), 196.60, and 196.37.

ISSUES 5 and 6: If Respondent's PICC was not and is not lawful, is a refund due and, if so, under what authority?

If Respondent's PICC was and is lawful, is a refund due based upon the manner the PICC was calculated and assessed?

(a) How should the amounts of those refunds be determined?
(b) To whom should the refunds be made?

Having decided that Ameritech's PICC is unlawful both in its existence and application, the next step is to decide whether all intrastate PICC revenues that have been collected should be refunded with interest.

The Commission has authority and a long-standing practice of ordering refunds with interest. (*See City of Milwaukee v. City of West Allis*, 236 Wis. 371, 294 N.W. 625 (1940); *Application of the Northwestern Telephone Company for Authority to Restructure Rates*, 4270-TR-1, 1980, 1980 Wisc. PUC LEXIS 2 (Dec. 22, 1980); Investigation *on the Motion of the Commission into the rates of Wisconsin Bell, Inc.*, 6720-TI-3, 1986 Wisconsin. PUC LEXIS 31 (August 29, 1986); *Application of Wisconsin Public Service Corporation for Approval to Increase Electric and Natural Gas Rates*, 6690-UR-111, 1999 Wisc. PUC LEXIS 2, *140, 185 P.U.R. 185 (January 14, 1999). *Complaint of AT&T Communications of Wisconsin, Inc. and MCI Telecommunications Corporation and WorldCom Technologies Inc. Against Century Telephone Enterprises and CenturyTel of the Midwest-Kendall, Inc. Regarding Access Charges*, 2815-TI-101 (November 30, 2000) (hereinafter *Complaint of AT&T et. al. Against CenturyTel.*).

Nevertheless, Ameritech maintains that the filed rate doctrine prohibits the Commission from retroactive ratemaking " because the disputed rates were collected pursuant to a published tariff" and therefore "[t]he Commission's remedial powers are limited to prospective relief or the withdrawal of Ameritech's PICC tariff." (Ameritech Reply Brief at 36)

Complainants, on the other hand, insist that because the PICC is not lawful, it could not be approved, and is therefore void *ab initio*. Ameritech counters that since staff dismissed the complaint in their May 1, 1998, letter, and neither AT&T nor the other complainants choose to appeal, "[t]he complainants have waived their right to challenge Ameritech 's PICC tariff." (Ameritech Reply Brief at 32.)

The record is not clear as to what Ameritech's statutory requirements are as to filing a tariff. Wis. Stat. § 196.19 requires each public utility within the state to file a rate schedule. Wis. Stat. § 196.196(2)(a) allows only limited review by the Commission of Ameritech Wisconsin's rate filing. "Except as required to enforce this subsection, the commission may not review or set rates for intrastate access services offered by price-regulated telecommunications utilities." The subsection requires the elimination of intrastate carrier common line charge or a substitute charge. AT&T witness Cathleen Conway testified that Ameritech's intrastate tariff is the same as its interstate tariff unless an exception tariff is filed, as was the case when Ameritech Wisconsin eliminated its carrier common line charge (i.e. the state access rate was different than the federal access rate). (Tr. at 55, lines 5-13.) This also was done when Ameritech Wisconsin filed an exception tariff on December 22, 1997, indicating that their intrastate PICC would be $0.16 instead of the $0.53 Federal PICC.

There are five important aspects of Ameritech's intrastate PICC filing in Wisconsin. First, Ameritech appears to have complied with *procedural* filing requirements. Second, the Commission has not until now taken any action in this case. Third, staff's May 1, 1998, acquiescence was not consistent with Ameritech's application. Fourth, on December 4, 1998, MCI filed the first complaint and request for hearing. AT&T also filed a complaint on December 18, 1998. Fifth, the Commission is authorized to enforce Wis. Stat. § 196.196(2)(b)3

requiring the elimination of a carrier common line access charge or a substitute carrier common line access charge for price regulated telecommunications utilities with more than 150,000 access lines in use in Wisconsin.

The question of whether the Commission can require Ameritech Wisconsin to issue refunds depends on the interpretation and application of the filed rate doctrine. The filed rate doctrine is codified in Wis. Stat. § 196.22[5]. Two cases provide both helpful guidance and illustrate the difficulty in applying the concept. "The doctrine generally forbids a regulated utility to charge rates for its services other than those filed with the appropriate regulatory authority." *GTE North Inc. v. Public Service Commission*, 176 Wis. 2d 559, 569, 486 N.W.2d 554, 288 (1993). "[A] utility must charge the rate that it files with the commission and that the commission approves." *Wisconsin Power & Light v. Public. Serv. Commission,* 181 Wis. 2d. 385, 396, 511 N.W.2d, 291,295 (1993). The court in *GTE North* and *WP&L* came to opposite ultimate conclusions however. The PSCW was allowed to order a refund against *GTE North* because the utility received money for providing an untariffed service. Furthermore, the court held that Wis. Stat. § 196.37(2)[6] conferred upon the PSC the authority to order a refund despite GTE North's argument that the phrase "in the future" limited the PSCW's power to only prospective relief. In *WP& L*, the court ruled that the PSCW did not have authority to issue a lump sum payment penalty against a utility for 15 years of imprudent management of a coal

[5]**Discrimination forbidden.** No public utility may charge, demand, collect, or receive more or less compensation for any service performed by it within the state, or for any service in connection therewith, then is specified in the schedules for the service filed under §. 196.19, including schedules of joint rates, as may at the time be in force, or demand, collect or receive any rate, toll or charge not specified in the schedule.

[6]**(2)** If the commission finds that any measurement, regulation, practice, act or service is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unreasonable or unlawful, or that any service is inadequate, or that any service which reasonably can be demanded cannot be obtained, the commission shall determine and make any just and reasonable order relating to a measurement, regulation, practice, act or service to be furnished, imposed, observed and followed in the future.

contract that resulted in customer overcharges. The case involved automatic fuel adjustment clauses ("FAC"), "a rate formula, approved by the PSC, which enables a utility to pass on increases in fuel costs directly to the utility's customers without going through the otherwise mandatory administrative review." *WP&L*, 181 Wis. 2d at 389, 511 N.W.2d at 292. The court deemed that because the FAC had been subject to statutory oversight as a result of the rate review process by the PSCW, the commission was precluded from imposing a penalty for past management imprudence. *WP&L*, 181 Wis. 2d. at 399, 511 N.W.2d at 296.

In this case, Ameritech Wisconsin has a tariff on file that was not approved by the *Commission* but rather allowed by staff to remain on file based, at least in part, on a misunderstanding or misinformation. While there is no evidence that the Commission delegated its authority to staff, one can conclude that staff acted consistent with PSCW practice. However, the twenty-day period for "appeal" mentioned in staff's letter, appears arbitrary, lacking any citable authority. (Wis. Stat. § 227.49 requires that a petition for rehearing in a contested case must be made within 20 days after service of the Commission's final order. AT&T's initial complaint did not result in a contested case (*see* Wis. Stat. § 227.01(3)) nor is staff's May 1, 1998, letter a final order.) Therefore, the Commission has, up to now, not taken any formal action in this case. Staff's letter, as it turned out, was a preliminary determination subsequent to a formal Commission hearing on the matter. This is not dispositive of whether staff's letter does and should have any significance, nor is it a critical question.

The amount of Commission authority is a determining factor in deciding whether to invoke the filed rate doctrine. In *Prentice v. Minnesota Title Ins. Co.*, 176. Wis. 2d. 714, 500 N.W. 2d 658 (1993), the court dismissed plaintiff's claim for treble damages against title insurance companies allegedly engaged in price fixing on the basis that the rates were lawful

under the filed rate doctrine. The court held that even though all the insurers had to do to set rates was file within 30 days after they began to be used, the critical determinative as to whether the Commission approved the rates was the Commission's authority to enforce the law. Distinguishing the United States Supreme Court's decision in *FTC v. Ticor Title Insurance Co.*, 119 L. Ed. 2d 410 (1992) (holding that plaintiffs alleging title insurance companies had engaged in price fixing were entitled to relief because the Wisconsin State Insurance Commissioner had not engaged in active supervision of the rates), the Wisconsin Supreme Court was not bothered by the regulatory agency's very limited involvement in the rate-making procedure. "This determination, does not change the fact that the Wisconsin Insurance Code provides the plaintiffs with a remedy . . . [T]he Insurance Commissioner . . . must disapprove any rate which restrains trade." 176 Wis. 2d 728, 500 N.W.2d 658, 663 (statutory citations omitted).

The case in hand is in mid-process until this decision is rendered. The significance of staff's letter in the context of the filed rate doctrine is therefore insignificant for three reasons. First, unlike the FAC process in the WP&L case, the Commission has not given formal approval to Ameritech Wisconsin's access rates regardless of what the staff did or said. At no time was there a hearing and an opportunity for complainants to develop their case. Second, the degree of the Commission's involvement prior to this decision and whether or not staff could represent the Commission does not alter the Commission's specific statutory authority and obligation to enforce Wis. Stat. § 196.196(2)(b)3. Third, Ameritech's application of the intrastate PICC is inconsistent with staff's May 1, 1998, letter. Staff believed Ameritech determined their PICC "based on intraLATA pre-subscription." (Exhibit 4.) Two weeks later, on May 15, 2001, Ameritech filed a correction stating that the PICC was being assessed on the basis of intrastate rather than intraLATA usage. (Ameritech also explained in a November 16, 2001, letter to

AT&T that based on their original filing with the FCC, the PICC is billed to the interLATA presubscribed carrier when an end-user has both an interLATA and an intraLATA PICC. (AT&T's December 16, 1998, complaint, attachment B.) Staff's conclusion made with less information than on this record does not alter the Commission's responsibility to enforce the law or to require refunds as a remedy. The Commission should be allowed to create as complete a record as possible from which to make the best informed decision. The potential benefits of a long-term competitive telecommunications market should not be sacrificed for the sake of expediency. In addition, as the Commission determined in the *Complaint of AT&T et. al. Against CenturyTel* (*Supra* at 26) , staff does not have authority to approve a rate in violation of the law.

There are additional reasons staff's initial findings should be accorded no weight nor be allowed to invoke the filed rate doctrine relative to this contested case proceeding. Ameritech's justification for its PICC filing was done on a confidential basis. Therefore the Complainants could not challenge staff's findings absent a formal hearing process. In addition, staff's finding was limited to the $0.16 PICC and based on the understanding that no "CCLC revenues . . . (were included) in development of the intrastate PICC charge." (Exhibit 4.) It is not clear from the record whether staff would have come to the same conclusion when Ameritech raised its intrastate PICC to $0.30 or whether when staff said no carrier common line revenues were included in Ameritech's CCLC charge that meant that $0.37 (the difference between the $0.53 interstate capped PICC rate and Ameritech's initial $0.16 intrastate rate) were carrier common line charges. If that is the case then there is no reason to believe staff would have approved the $0.30 rate or that staff's conclusion as to the $0.16 PICC should not be reexamined based on what appears to be multiple incorrect reasons for their decision.

In summary, staff's letter was not the result of a hearing process, provided no legal basis for its 20 day appeal period, was not part of any formal Commission procedure, did not take into account the effect of the $0.30 PICC, did not consider the effect of intrastate or intraLATA pre-subscription and could not contravene the law. Ameritech must have understood that the basis for staff's determination was flawed. They did nothing to correct staff or further explain their filed tariff. Their silence under the circumstances was at their peril. If the Commission is to have any meaningful regulatory authority, decisions must be made on accurate and pertinent information. As a result, any rate on file with the Public Service Commission of Wisconsin in regards to Ameritech's intrastate PICC must precede Ameritech's December 22, 1998, filing.

As has been decided, Ameritech's PICC is not distinguishable in any relevant way from a carrier common line charge and is in violation of Wis. Stat. § 196.196(2)(b)1. The Commission may require refunds collected as a result of Ameritech charging rates not in compliance with Wisconsin Statutes and in violation of the agreement Ameritech made when it opted for price regulation.

Since Ameritech instituted a carrier common line charge or a substitute charge in violation of Wis. Stat. § 196.196(2)(b)3, they may not retain the collection of the illegal charge. The Commission has "the authority to order a refund of compensation collected by a utility in violation of its filed tariffs." (*GTE North*, 176 Wis. 2d at 568). Because staff's May 1, 1998, letter does not constitute Commission approval of Ameritech's tariff filing in light of this decision and the tariff filing, upon further inspection, is in violation of Wis. Stat. § 196.196(2)(b)3, refunds are the appropriate remedy.

(Confidential exhibits 109 and 110 are Excel's and MCI's calculations due them as of December 13, 1999. Those exhibits will need to be updated in accordance with this decision and order.)

Commensurate with the Commission Order in *Complaint of AT&T et al. against Century Tel.* (*Supra* at 26), interest on the refund will be calculated in accordance with the method whereby telecommunications utilities are required to pay interest on deposits per WIS. ADMIN. CODE PSC § 165.051(5). The calculated interest rates for 1998, 1999, 2000, and 2001 are respectively, 5.5, 4.5, 5.7 and 6.0 percent.

Issue 7: If Respondent's PICC was not and is not lawful, is Respondent liable to the Complainants for treble damages under WIS. STAT. § 196.64?[7]

Complainants state that Ameritech's charging an intrastate PICC was both willful and egregious. Maintaining Wis. Stat. § 196.64 applies to more than just physical injury, complainants argue that the statute is triggered by Ameritech's "conscious action in deliberate disregard of the rights of others." (Joint Proposed Order of Complainants at 47.)

Ameritech's actions do not rise to the level of wanton disregard for the rights of others even if WIS. STAT. § 196.64 applies to this fact situation. It would be too harsh under these circumstances to apply punitive sanctions to Ameritech for defending their actions in this dynamic environment. Though staff misunderstood the true nature of Ameritech's intrastate

[7] **196.64 Public Utilities, liability for treble damages. (1)** If a director, officer, employe or agent of a public utility, in the course of the discharge of his or her duties, willfully, wantonly or recklessly does, causes or permits to be done any matter, act or thing prohibited or declared to be unlawful under this chapter or ch. 197, or willfully, wantonly or recklessly fails to do any act, matter or thing required to be done under this chapter, the public utility shall be liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation. No recovery as in this section provided shall affect a recovery by the state of the penalty prescribed for such violation.

(2) The burden of proof in an action under sub. (1) rests with the person injured to prove the case by clear and convincing evidence.

PICC access charge, the case demonstrates that Ameritech's actions needed to be scrutinized and investigated since what Ameritech had done was at least open to debate. That Ameritech is required to refund all intrastate PICC charges with interest is sufficient punishment. To award treble damages (again assuming Wis. Stat. § 196.64 even applies) would discourage one side's legitimate ability to contribute to meaningful discourse on developing policy matters and is far too punitive under the circumstances. The information was interpreted in a suitable forum. The matter has now been reviewed by virtue of a hearing, a decision reached, and the aggrieved parties made whole.

ISSUE 8: If Respondent's PICC was not and is not lawful, should forfeitures be sought for respondent's violation and, if so, under what authority?

Both sides agree, the Commission cannot impose forfeitures or award civil damages. Excel and MCI WorldCom, however, ask the Commission to seek forfeitures in another forum against Ameritech for its "willful, wanton and reckless . . . (conduct) knowingly and in conscious disregard of interexchange carriers' rights." (MCI WorldCom and Excel Response Brief at 33.)

Ameritech presented their case to the Commission. The Commission does not believe that the actions that led to this dispute were reckless and has no current intention to pursue this matter further.

ORDER

The Commission orders:

1. Ameritech shall refund to AT&T, Excel, MCI WorldCom and Sprint and all other intrastate access customers all intrastate PICC revenue it has collected since January 1, 1998, together with interest of 5.5, 4.5, 5.7 and 6.0 percent for the years 1998-2001, from the date of

payment by the customer to the date of refund by the company. Those refunds shall be made to AT&T, Excel, MCI WorldCom and Sprint and all other access customers not later than 90 days from the effective date of this Order.

2. Within 30 business days after the issuance of effective date of this Order, AT&T, Excel, MCI WorldCom and Sprint shall furnish to Ameritech and to staff their calculations of the respective overcharges to be refunded to them. In the event of any dispute as to the actual amount due any customers, staff shall attempt to resolve the dispute or, failing that, submit the matter to the Administrative Law Judge for decision. In no event shall this extend the time for Ameritech to effect refunds to AT&T, Excel, MCI WorldCom and Sprint beyond the deadline set in paragraph 1.

3. Ameritech shall give no further effect to the rates it has filed for its intrastate PICC, which are void, and of no effect. Ameritech shall immediately file for a PICC rate of zero in its exception tariff for access services. This is not intended to limit Ameritech's ability to seek an intrastate PICC that is split 50/50 between interLATA and intraLATA PICs, should its interstate PICC ever recover non-carrier common line charges and be otherwise lawful.

4. A 50/50 split between interLATA and intraLATA carriers in the event that Ameritech' s interstate PICC contains non-carrier common line revenues or costs, and Ameritech's correct use of these formulae will be considered to produce lawful competition-neutral rates.

5. Ameritech shall not interrupt or in any manner diminish the range or quality of the services it is providing to access customers, which are parties to this Complaint.

6. Jurisdiction is retained to oversee Ameritech's compliance with the mandates set forth in this Order.

Dated at Madison, Wisconsin, _____

By the Commission:

_____
Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

APPENDIX A
(Contested)

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

Public Service Commission of Wisconsin
(Not a party but must be served)
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SERVICE LIST
(August 2, 2001)

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